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For information

OFFICE OF THE PRIVACY COMMISSIONER'S REPORT ON THE CANADA BORDER SERVICES AGENCY'S EXAMINATION OF DIGITAL DEVICES

For the Minister

ISSUE

Further to our meeting on December 3, 2019, the Canada Border Services Agency (CBSA) is providing a preliminary analysis of the Office of the Privacy Commissioner's (OPC) recommendations for legislative changes.

BACKGROUND

In response to the OPC's recommendations for legislative changes, the Agency provided operational context to the OPC regarding how the proposed legislative changes would affect the CBSA's ability to enforce border laws and fulfil its mandate. The CBSA also indicated that its policy fulfilled the spirit of the recommendations by recognizing the potentially personal nature of digital devices and imposing a policy threshold on the examination of these devices. In its final Report, the OPC noted that the CBSA rejected the three legislative changes.

LEGAL CONTEXT AT THE BORDER

The legal framework at the border is very different from an inland context. First, there is a reduced expectation of privacy at the border which has been upheld consistently by the Supreme Court. Second, a country's sovereignty over its border and its right to inspect everything crossing its borders is a principle of fundamental justice. This principle recognizes the fact that there is a lack of prior knowledge or control over goods or people before they reach the border and the need for a country to exercise control over its border to protect social interests such as national security.

Specific to the examination of digital devices, jurisprudence to date has been clear that documents on digital devices are goods and are subject to the same examination authorities as other goods at the border. Courts, to date, have also upheld the constitutionality of these types of examinations and have ruled that digital device examinations do not violate a person's section 8 *Charter* rights. However, jurisprudence is evolving and there are ongoing appeals of some of these decisions.

This legal context is important to understanding the CBSA's success in defending its authority to examine digital devices.

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HOW THE CBSA CONDUCTS DIGITAL DEVICE EXAMINATIONS

Despite the wide authority to examine digital devices on a no-threshold basis, the CBSA acknowledges that there may be more personal information on digital devices than in other goods and has developed a dedicated policy. Courts have recognized that government can protect individuals' rights through departmental practice. That is, legislation sets a baseline and then it is for Departments to implement that legislation in a way that is consistent with the *Charter* and privacy legislation. All CBSA examination policies aim to operationalize the *Customs Act* in a way that protects individuals' rights, including the CBSA policy on digital device examinations. The OPC itself has previously acknowledged that "CBSA has... recognized the inherent sensitivity surrounding the examination of digital devices" in the Agency's guidance to officers.

In order to protect travellers' privacy, officers are directed not to examine digital devices as a matter of course. Rather an officer must gather a multiplicity of indicators that cause them to have concerns that evidence of a contravention of border laws can be found on the device. In addition, officers are only permitted to examine content that is stored on the device itself. Officers avoid examining online or cloud-based content by enabling airplane mode to disable network connectivity. When possible, officers also conduct their examinations in the presence of the traveller so as to be transparent about their actions. Officers must also keep accurate and contemporaneous notes that detail what they examined on the device and why.

CONSIDERATIONS

In its response to the OPC, the CBSA highlighted the operational impacts that these legislative changes would cause. Simply exempting digital devices from the definition of goods, absent further amendments, would result in the CBSA being unable to examine these devices because the examination authorities in the *Customs Act* are based solely around the examination of goods. An untenable situation would arise where an officer would be able to examine a printed receipt found in a piece of luggage but could not examine that same receipt if it were stored in a digital device.

In regards to the other two recommendations about formalizing a threshold for these examinations in law, this would cause impacts on the Agency's ability to fulfil its mandate to control the border and the people and goods crossing it. Writing the CBSA's policy into law takes away the Agency's ability to adapt and update its policies in response to a shifting border environment, technological advances, world trends and other events affecting the border. One particular challenge with legislating the current policy threshold is that the validity and factual existence of indicators would be subject to intense scrutiny and the subjective nature of indicators could make it difficult to definitively establish in court that the threshold of reasonable grounds to suspect has been reached. Future litigation against the Agency's examinations would focus on determining if the indicators the officer observed were legitimate. Constitutional challenges will likely describe indicators as vague, overbroad, lacking a rational connection to the underlying purpose and potentially discriminatory against ethnic, cultural or racial groups. Legislating a reasonable grounds to suspect threshold could lead to a situation where, even

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despite anomalies observed by officers, circumstances would fall short of reasonable individualized suspicion, and would leave officers with no means to further advance to that threshold.

The CBSA's response to the OPC is consistent with the Government's previous positions on this issue. In 2017, the Standing Committee on Access to Information, Privacy and Ethics' (ETHI) made a similar proposal to the Government that did not result in legislative changes. In its response to ETHI, the Government did not accept the recommendations, citing the operational impacts these recommendations would have and the court rulings that have supported the CBSA's examination of digital devices. That same year, the OPC recommended to elevate the threshold for the examination of digital devices by U.S. preclearance officers under the *Preclearance Act, 2016* to reasonable grounds to suspect. Once again, the Government did not accept the recommendation for legislative changes.

Notwithstanding the above, more legal and policy work is needed in order to understand the ramifications of the OPC's recommendations and to reconcile potential protections for digital devices with CBSA's operational need to enforce and administer border legislation. Other options for legislative changes could include limiting types of data examined or dictating the manner in which an examination must be carried out.

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NEXT STEPS

The CBSA will provide you with a comprehensive communications package in advance of the tabling of the OPC's Report which will highlight the legal and policy work the CBSA is undertaking to help inform your decision on this issue.

The wide usage of digital devices in daily life; the dissonance between the court-affirmed reduced expectation of privacy at the border and an individual's sensitivity about the contents of their devices; and the necessity to control the movement of goods across Canada's borders mean that this issue will continue to be debated in the public and litigated before the courts. The Agency will continue its analysis of potential options for legislative changes and provide you with a comprehensive briefing.

Please note that I am available to discuss, or have CBSA officials brief your staff, at your convenience.


John Ossowski
President

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c.c.: Monik Beauregard, A/Deputy Minister
Public Safety Canada